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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1251

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of California

Brief in Support of Motion to Recall Mandate and for Leave for District Court to Consider Motion to Set Aside Judgment for Fraud Upon the Court, Pursuant to Rule 60(b), Federal Rules of Civil Procedure

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Brief in Support of Motion to Recall Mandate and for Leave for District Court to Consider Motion to Set Aside Judgment for Fraud Upon the Court, Pursuant to Rule 60(b), Federal Rules of Civil Procedure

STANDARD OIL COMPANY OF CALIFORNIA ("Standard") submits this brief in support of its motion to recall the mandate of this Court, and for leave for the District Court to consider a motion to set aside the judgment of that Court for fraud upon the Court, pursuant to Rule 60(b), Federal Rules of Civil Procedure.

A. PRELIMINARY STATEMENT

In September, 1969, the United States brought a civil action against defendant Standard in the United States District Court for the Northern District of California under Section 4 of the Sherman Act, 15 U.S.C. § 4 (26 Stat. 209, as amended). The complaint alleged violations of Section 3 of the Sherman Act, 15 U.S.C. § 3 (26 Stat. 209, as amended),[1] in the sale and distribution of petroleum products in American Samoa.[2]

In June, 1972, a trial was held in the District Court, sitting without a jury. The trial lasted eight court days. The United States offered the testimony of two witnesses, Standard the testimony of four witnesses; the parties designated the deposition testimony of some 32 witnesses for inclusion in the record, representing 1,800 pages of transcript; there were 1,100 documentary exhibits offered and received in evidence.

In October, 1972, the District Court entered its findings of fact and conclusions of law, adopted verbatim from the findings of fact and conclusions submitted by the United States.[3]

In December, 1972, the Court entered its judgment; on June 4, 1973, this Court summarily affirmed the judgment

1. Section 3 provides in pertinent part: "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce in any Territory of the United States * * * is declared illegal."

2. In the October Term, 1971, this Court held in this case that Section 3 of the Sherman Act applies to American Samoa, reversing the District Court (*United States v. Standard Oil Co.* (1972) 404 U.S. 558).

3. The District Court held that Standard had violated Section 3, by (1) entering into a combination and conspiracy to restrain and monopolize the distribution and sale of petroleum products in American Samoa (a) in 1956 with a former Governor of American Samoa, since deceased, and with the former Attorney General of American Samoa, later Deputy High Commissioner of the Trust

of the District Court, on the basis of the jurisdictional statement and the motion to affirm (*Standard Oil Company of California* v. *United States* (1973) 412 U.S. 924).[4]

On July 3, 1973, this Court sent a certified copy of its judgment to the District Court.[5]

B. PROCEDURAL BACKGROUND OF THIS MOTION

In May, 1974, a treble-damage plaintiff brought suit against Standard in the United States District Court for the Central District of California under Section 4 of the Clayton Act, 15 U.S.C. § 15 (38 Stat. 371) (*William R. McCook v. Standard Oil Company of California, et al.*, No. CV 74-1190 HP). The other defendants were Van Camp, Star-Kist, and Pan Am. The plaintiff alleged that he was a potential entrant into the petroleum market in American Samoa who had been excluded by the illegal conduct of Standard, joined in by the other defendants. The complaint against Standard was based, in part, upon the findings and judgment in the prior case, including a specific finding that

Territory of Micronesia, (b) since 1956 with Van Camp Sea Food Company, a customer in Samoa, and (c) since 1963 with Star-Kist Foods, Inc., a customer, and by (2) entering into illegal requirements contracts with Van Camp, Star-Kist, and Pan American World Airways, Inc., for the purchase of petroleum products in American Samoa.

4. The judgment (1) enjoined Standard from continuing or renewing the combination and conspiracy, (2) enjoined Standard from entering, continuing or renewing any requirements contracts with customers in American Samoa, and (3) ordered Standard to share the petroleum storage facilities in American Samoa with other suppliers on a shared-cost basis.

5. In cases coming from federal courts, a certified copy of this Court's judgment is sent to the lower court in lieu of a formal mandate (Rule 59(3), Rules of the Supreme Court of the United States).

plaintiff had been wrongfully excluded by Standard from the petroleum market in Samoa.[6]

In August, 1974, the treble-damage plaintiff filed a motion for summary judgment as to liability of defendant Standard alone: plaintiff contended that the issues of liability had been fully litigated in the prior suit, and that Standard was unable to produce any new, previously unobtainable evidence (A-739-740),[7] which would produce a different result. On February 7, 1975, the District Court denied the motion for summary judgment, holding that Standard was entitled to a jury trial.[8]

In April, 1975, Standard initiated discovery proceedings in the treble damage suit. Thereafter, from June to December 1975, Standard discovered, in response to a request for production of documents and subpoenas duces tecum, documents not previously disclosed to Standard in the files of plaintiff, his agent who participated in the collection of documents in the prior suit, and his attorney. These documents were not produced for Standard in the prior suit,

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6. Finding 67 in the prior case provided:

"Because of SoCal's dominant position in American Samoa, its illegal combination and conspiracy with the canners and the illegal requirements contracts, many potential competitive petroleum suppliers have been foreclosed from the market, including the following:

* * * * *

"William R. [TR 2064-2065, TR 2071, TR 2074; GX 228] McCook"

7. As used herein, "A" refers to the printed appendix to this motion.

8. The District Court held that the judgment in the prior case created a rebuttable, not a conclusive, presumption of liability against Standard, under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (38 Stat. 731, as amended), which provides that: "[a] final judgment * * * rendered in any civil * * * proceeding brought by * * * the United States under the antitrust laws * * * shall be prima facie evidence against such defendant in any action * * * brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto * * *."

despite subpoenas duces tecum by Standard to the plaintiff and the attorney, and requests by Standard to the agent.[9]

In March, 1976, Standard discovered in response to subpoenas duces tecum, in the files of a law firm retained by plaintiff's attorney in the prior suit, another group of relevant documents. These included originals or copies of (1) documents which had, in fact, been delivered to the Department of Justice in the prior suit and then to Standard; (2) documents which had not been produced for Standard in the prior suit, but which had been produced for the first time in the treble damage suit from the files of plaintiff and his agent; and (3) still further new documents which had not been produced either in the prior suit or to that point in the treble damage suit.[10]

In February, 1976, Standard noticed the depositions of the Department of Justice and the Antitrust Division trial attorney in the treble damage suit, and served a subpoena duces tecum upon each deponent.[11] The Department of Justice and the trial attorney moved for a protective order that the notices of deposition be vacated and the discovery not be had on the ground, inter alia, that the trial attorney did not recall receiving, prior to trial, any documents from the files of the agent, other than a specific set which had

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9. The agent attempted to explain his failure to produce documents by stating that he had delivered all his documents to the Department of Justice prior to trial, and in subsequent searches of his files, did not look into the materials returned by the Justice Department to him, assuming these documents had been turned over to Standard (see pp. 34-35, infra).

10. In the prior suit, the plaintiff's agent had sent these documents to the law firm for analysis concerning a possible treble damage suit.

11. The subpoenas duces tecum requested each deponent to produce all documents received in the prior suit from the treble damage plaintiff, his agents, or his attorneys, including all correspondence and memoranda relating to the transmittal of documents to or from those persons.

been produced for Standard by the Department in the prior suit.[12] However, attached to an affidavit in support of the motion by the trial attorney were a number of new documents, including a letter written by the treble damage plaintiff's agent to the trial attorney a few months after the judgment of the District Court was affirmed by this Court, to which were appended 12 letters or memoranda. These 12 letters and memoranda were covered by the pretrial subpoenas of Standard, but had not been produced at any time in the prior suit, either before trial or after trial.[13] One letter was highly relevant. It contradicted the testimony of McCook (the treble damage plaintiff), cited in the findings adopted by the District Court, that he was foreclosed from American Samoa by Standard's price reduction (A-191).

In March, 1976, the District Court for the Central District of California granted the motion by the Department of Justice and the trial attorney for a protective order and ordered that the discovery not be had by Standard in the treble damage suit. Instead, the District Court, having re-

12. The Department of Justice and the trial attorney further contended that all unprivileged documents sought by Standard were either already in Standard's possession or were being supplied voluntarily; that the production of documents had already been extensively explored in the Government case; and that if Standard were contending that the Government had acted improperly in that case, the proper forum was the District Court for the Northern District of California before the trial judge under Rule 60(b), Federal Rules of Civil Procedure.

13. Instead of disclosing the new documents to the District Court or to Standard, the United States returned them to the treble damage plaintiff's agent but retained copies of the documents for its own files. Later, in response to an order by the District Court for the Northern District of California to produce all documents received from third parties post-trial on the issue of relief, the United States produced the letter written by the agent, but not the 12 enclosed documents (see pp. 63-65, infra).

viewed the briefs submitted by Standard which outlined the discovery procedures in the prior case, noted that:

> "it • • • seems to me that what you are saying is attacking the integrity of the process, the integrity of the Justice Department, the integrity of [the trial judge's] ruling. And if I were [the trial judge] I would certainly want to know about it" (A-745).

And the District Court added:

> "I certainly think that he [the trial judge] not only has an interest in the matter, because he did decide the case, but that some serious questions have been raised concerning the integrity of that case, and those matters ought to be laid before him under Rule 60" (A-747).[14]

In March - April, 1976, the Department of Justice and Standard sent to the trial judge, Northern District of California, copies of the briefs and motion papers filed in the Central District of California. In addition, the Department of Justice, Standard and the treble damage plaintiff

14. In the proceeding before the Central District, Standard urged that the test to be used in the treble damage suit to determine whether plaintiff should be permited to use, as *prima facie* evidence, the judgment in the prior suit, where he had failed to produce documents in that suit, was different than the standards that might be applied by the Northern District or by the Supreme Court in vacating the judgment, or amending the findings, in the prior suit on grounds of fraud, newly discovered evidence, or the like. It was Standard's position in the treble damage suit that plaintiff should not be permitted to use the judgment in the prior suit as evidence, (a) where Standard did not have a full and fair opportunity to defend (*Blonder-Tongue v. University Foundation* (1971) 402 U.S. 313, 334; *Rachal v. Hall* (5 Cir. 1970) 435 F.2d 59, 62-63, certiorari denied (1971) 403 U.S. 904); (b) where the plaintiff ignored the subpoenas duces tecum in the prior suit and failed to produce all relevant documents, and thus because of unclean hands was not entitled to rely on that judgment as evidence in his own suit (e.g., *Keystone Co. v. Excavator Co.* (1933) 290 U.S. 240, 244; *Shawkee Mfg. Co. v. Hartford Co.* (1944) 322 U.S. 271, 273); and (c) where the probative value of the judgment as evidence was outweighed by the danger of prejudice to Standard because of the incomplete record in the prior suit (Rule 403, Federal Rules of Evidence).

brought to the attention of the trial judge the comments by the Central District; Standard pointed out the conflicts between the testimony of plaintiff's agent and the ex-parte affidavits of the Department of Justice concerning the production of documents prior to trial in the earlier suit.[15]

In April, 1976, the trial court, by letter to Standard and to the Department of Justice, informed the parties that as far as it was concerned the prior suit was closed, and that all further correspondence should be directed to the United States District Court for the Central District of California (A-733).

In April, 1976, the District Court for the Central District, in the treble damage suit, denied a motion by Standard for reconsideration of its ruling granting a protective order and ordering that discovery not be held.[16] The Court stated that

15. Standard requested a conference with the District Court for the Northern District of California at an early date to determine what steps could, or should, be initiated in this suit noting that a judgment of the Supreme Court was involved (A-719, 732); the Department of Justice took the position that the proper method for dealing with the failure to produce evidence was not to hold a conference, but to require Standard to set forth in a motion to the District Court the relief which Standard sought, and the basis for seeking such relief (A-725-726).

16. Standard, in support of the motion for reconsideration, urged that apart from questions of the admissibility of the judgment as evidence, the depositions of the Department of Justice and the trial attorney sought evidence on the following subjects: (a) whether the plaintiff and his agent were telling the truth in the treble damage suit with respect to the location and discovery of documents, (b) the weight to be given by the jury to the prior judgment, if admitted in evidence, because of the inference that the documents were harmful to plaintiff if Standard could establish that plaintiff failed to disclose the documents not only to Standard, but also to the Department of Justice; (c) whether Standard had obtained in the treble damage suit all the documents of plaintiff and his agent because of the reservation expressed by plaintiff's counsel that some documents might previously have been delivered to the Department of Justice by the agent but not returned; and (d) the disposition of documents sent by an attorney consulted by the agent to the Department of Justice in December, 1969, shortly after the agent had delivered documents to the Justice Department.

the judgment in the prior case would be admitted in evidence in the treble damage suit, regardless of a withholding of documents by the plaintiff or by the Department of Justice; it stated, again, that Standard's remedy was a motion under Rule 60 (A-752).

In May, 1976, Standard deposed an attorney and his law clerk who reviewed documents submitted to them by the agent for plaintiff in 1969, shortly after the United States' complaint was filed, in connection with a possible treble damage suit against Standard. The law clerk testified that the agent brought in at least one, perhaps two, grocery boxes of documents. He stated that one grocery box was more than one-half full of documents and that he spent two or three days, eight hours per day, reviewing the documents. The law clerk and the attorney identified a number of documents which they had seen in 1969, including documents not produced for Standard in the prior suit, and documents not produced by plaintiff, his agent, or attorney in the treble damage suit, but located in the files of the law firm consulted by plaintiff's attorney in the prior suit.

This motion then followed.

C. RULE INVOLVED

Rule 60, subdivision (b), provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party • • • from a final judgment • • • for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) • • • it is no longer equitable that the

judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time * * *. * * * This rule does not limit the power of a court * * * to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."[17]

D. JURISDICTION

Where a judgment of a District Court has been affirmed on appeal, it is beyond the power of the District Court to entertain a motion to set aside the judgment under Rule 60(b), or otherwise to deviate from the mandate of the appellate court, without first obtaining the permission of the appellate court (*In Re Potts* (1897) 166 U.S. 263, 267-268; *Wilson Research Corp. v. Piolite Plastics Corp.* (1 Cir. 1964) 336 F.2d 303, 305). In proceedings to set aside a judgment for fraud upon the court, or other grounds specified in Rule 60(b), the appropriate procedure is to request the appellate court, in this instance the Supreme Court, to recall its mandate, and to grant leave for the District Court to consider the motion under Rule 60(b) (e.g., *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 239-240; *In Re Potts* (1897) 166 U.S. 263, 267-268; *Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1963) 320 F.2d 594, 602, n. 11).[18]

17. For reasons (1), (2), and (3), the motion must be made not more than one year after the judgment was entered.

18. In the Tenth Circuit, it has been held unnecessary to obtain leave of the appellate court to file a motion under Rule 60(b) in the District Court, where the judgment of the District Court has been reviewed on appeal (*Wilkin v. Sunbeam Corporation* (10 Cir. 1968) 405 F.2d 165, 166), but the Tenth Circuit minority view has been criticized by a respected commentator (7 Moore's Federal Practice (2d Ed. 1975) par. 60.30[2], p. 429). In the Second Circuit, the procedure is unresolved (*Doe v. Hodgson* (5 Cir. 1974) 500 F.2d 1206, 1207).

The motion by Standard is timely, being made within one year after its discovery of the failure to produce documents in the prior suit, within four months after the Department of Justice delivered to Standard the documents it received post-trial in the prior suit, within three months after Standard uncovered further documents in the files of the law firm consulted by plaintiff's attorney in the prior suit, and two months after the denial by the District Court, Central District of California, of Standard's request for reconsideration of its ruling on the protective order.

E. SUMMARY OF FACTS AND ARGUMENT

The present case transcends the interests of the parties. It involves a tampering with the administration of justice and a wrong against the institutions set up to protect and safeguard the public, which led to a judgment in the trial court, affirmed by this Court, on an incomplete record. It involves a failure by two material witnesses, and if the testimony of one witness is believed, by the Department of Justice and its trial attorney, to produce documents called for by subpoenas duces tecum and repeatedly sought by Standard in the court below.[19]

When a motion is made to recall a mandate to permit a subsequent motion in the trial court for relief pursuant

19. In *United States v. Liddy* (D.D.C. 1972) 354 F.Supp. 208, the District Court stated:

> "The purpose and importance of subpoenas *duces tecum* * * * to the judicial process are well known. * * * This duty to come forward with information relevant to the controversy at hand has been recognized as a fundamental instrument of justice since the earliest days of Anglo-American law" (354 F.Supp. 208, 211).

to Rule 60(b), there must be a detailed showing of evidence to warrant relief. This brief makes that showing.

The facts may be briefly summarized:

In October, 1969, the Department of Justice received certain documents from an agent of the treble damage plaintiff, who at the time was assisting the treble damage plaintiff in the preparation of a claim against Standard based upon an eventual judgment in this case.

In April, 1970, during pre-trial discovery, the Department of Justice delivered to Standard 62 documents, comprising 100 pages, from the files of plaintiff's agent. Standard did not receive an additional 78 documents, comprising 116 pages—not including 81 pages of duplicates—in the files of plaintiff, the agent, and several attorneys. Because Standard knew of the proposed treble damage suit, it made a determined effort to discover these documents. In disregard of subpoenas duces tecum, these documents were not produced and Standard, without the benefit of the documents, went to trial on an incomplete record.

In August, 1973, the District Court ordered separate hearings to be held on the relief to be decreed in the suit by the United States. In connection with those hearings, plaintiff's agent sent to the Justice Department documents from his files prepared during the period in dispute at trial, which had not been produced prior to trial, and which contained facts inconsistent with plaintiff's testimony. Instead of disclosing these documents to Standard or to the District Court, the Justice Department returned the documents to the agent, and thereafter failed to produce them for the Court or Standard, despite an order by the Court to produce documents received post-trial on the issue of relief.

The argument may be briefly summarized:

The judgment below, and findings upon which the judgment was based, should not be permitted to stand where

a material witness failed to produce exculpatory documents in his possession which were relevant to the issues in the case. Further, because of the unclean hands of the treble damage plaintiff, the District Court should strike the findings relating to him, and enter an order denying prospective use of the judgment as evidence in the treble damage suit.

In addition, a failure to produce evidence post-trial, the importance of which could not have escaped the United States' attention, warrants setting aside the judgment and ordering a new trial, regardless of the motives of the Justice Department in failing to produce the documents. This is required by standards of fairness inherent in due process; further, it is warranted by this Court's supervisory powers over the lower federal courts.

Finally, if there was a suppression of documents by the United States prior to trial, the judgment should plainly be set aside. Because the treble damage plaintiff's agent has testified that he made specific documents available to the Justice Department, which were not produced for Standard, and because he testified that the documents he delivered to the attorneys consulted by him were also delivered to the Justice Department, there is at least a *prima facie* case of suppression by the Department of Justice which warrants a hearing in the District Court.[20]

When viewed against the documents produced in the prior case, the documents which were withheld are relevant, undermine the testimony of two witnesses, would have

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20. If the District Court determines that the Justice Department did not suppress documents, but that the plaintiff's agent turned over to other attorneys documents not produced for the Department of Justice, there are further grounds for the District Court to strike the findings relating to the plaintiff and to deny plaintiff the prospective effect of the judgment in the treble damage suit.

been useful in cross-examination of other witnesses, and put the testimony and evidence with respect to at least one other supplier, Shell, in a different light.

F. STATEMENT OF FACTS

The discovery of the suppression of evidence in this case had a long and tortuous history. In the Addendum to this brief we set out this history, step by step, from the institution of suit by the United States to the recent production of theretofore undisclosed documents in the files of McCook's San Diego attorneys. The chronology shows why Standard suspected that documents had not been produced, why Standard made repeated requests for documents to the treble damage plaintiff, his agent, his attorney, and the Department of Justice, and why the failure to produce documents was not inadvertent.

A reading of the facts disclosed in this chronology will, we submit, demonstrate the need for relief. We summarize these facts as follows:

1. Principal Participants in Discovery Proceedings; Documents, Testimony of Turnbull, McCook, in Suit by United States:

First, we set forth the names of the principal participants in the discovery proceedings: Bernard M. Hollander, Esq., trial attorney, Antitrust Division, Department of Justice; Raymond C. Turnbull, agent and "legman" for plaintiff in the preparation of a treble damage suit (A-508-509), who had his own files concerning American Samoa; William R. McCook, the treble damage plaintiff, who had separate files concerning his interest in American Samoa;[21] Richard B. Lynn, Esq., attorney for Turnbull and McCook. The other participants will be identified as they appear.

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21. The interest of McCook in American Samoa was based upon activities of Turnbull, as his agent or partner.

Second, we note briefly the incomplete account which was presented in this suit by the documents of Turnbull and McCook, together with their testimony: in 1961-1965, there was an investigation by Raymond C. Turnbull, a promoter, of various business opportunities in American Samoa, including petroleum storage facilities in competition with Standard; in 1963-1965, there were various inquiries by Turnbull concerning petroleum supply in American Samoa, resulting in securing a supply of petroleum products and arranging for a terminal to be financed by McCook; in August, 1965, there was a proposal submitted by McCook to Governor H. Rex Lee for petroleum supply in American Samoa, but McCook did not hear back from Governor Lee; in view of two price reductions by Standard in diesel fuel, one in July, 1965, and one in October, 1965, McCook was "shot out of the saddle" (A-486) and was unable to enter the market in Samoa (A-487-488).

2. Subpoenas, Requests to Produce Documents in Suit by United States:

Standard made a determined effort to collect all relevant documents on the issue of liability in the suit by the United States. Shortly after the complaint was filed, Standard filed a motion to produce documents (A-267-270, 276-277); the United States stipulated to produce documents in its own files, as well as documents that it had obtained from third parties (A-279-282). Further, Standard served subpoenas duces tecum upon McCook and Lynn (A-352-357); it made repeated requests to Lynn, who represented Turnbull as well as McCook, to produce all documents from the files of Turnbull and McCook.

Turnbull delivered documents prior to trial to the United States. The United States, in turn, delivered to Standard

a set of documents—62 documents—100 pages—from the Turnbull files, numbered TU-001 - TU-100.[22] Prior to trial Lynn and the United States represented to Standard that there were no additional documents; we set forth those representations, in chronological order, below:

a. January 13, 1971 — Written representation by Lynn to counsel for Standard:

"Those documents previously marked TU-001 through TU-100 constitute the totality of the Turnbull file * * *" (A-328) (emphasis added);

b. March 23, 1971 — Oral representation by Lynn at his deposition by Standard pursuant to subpoena duces tecum:

"Q. In other words, *is what you are telling me is that the documents that have previously been produced and numbered TU-001, et cetera, are all the documents in your possession or control or under the possession or control of Sullivan, Augustine, in San Diego that relate to the various paragraphs of the subpoena?*

"A. *Yes, I can make that representation*" (A-369) (emphasis added);

c. April 23, 1971 — Written representation by Lynn to counsel for Standard:

"REF MARKETING PETROLEUM AMERICAN SAMOA. PLEASE BE ADVISED MESSRS. TURNBULL AND McCOOK FILES EXAMINED WEEK ENDING APRIL 17, 1971. YOU HAVE MY ASSURANCE THAT THERE ARE NO FURTHER DOCUMENTS. THIS ASSURANCE IS UNEQUIVOCAL

22. TU-001-TU-100 were the identification numbers given the documents produced by the Department of Justice for Standard in April, 1970, from the files of Turnbull (A-283).

AND IS IN NO MANNER DEPENDENT UPON MY INDEPENDENT JUDGEMENT RESPECTING RELEVANCE" (A-414) (emphasis added).

d. May 13, 1971 — Written representation by United States Department of Justice to counsel for Standard:

"This is in response to your letter of May 5, 1971. As we have repeatedly stated to you, *we recall no documents provided to the Government by Mr. Turnbull which were not marked with TU identification, returned to Mr. Turnbull and provided for your use*" (A-422) (emphasis added);

e. May 18, 1971 — Acknowledgment by counsel for Standard of confirmation from United States that there were no additional Turnbull documents:

"I appreciate your written confirmation that the Government saw no Turnbull documents other than those which have been marked with a 'TU' identification. * * * Mr. Turnbull has said that he is contemplating an action against Standard (apparently based upon the allegations of the Government complaint) and, for this reason, the rather incongruous absence from his files of documents which we located elsewhere gave me concern" (A-425).

3. Subpoenas, Requests for Production of Documents in Treble Damage Suit:

In the treble damage suit, Standard has discovered a number of new documents not produced in the prior suit brought by the United States. These documents were in the files of (1) Turnbull, (2) McCook, (3) Lynn, (4) the law firm consulted by Lynn and Turnbull in the prior suit with

respect to a later, possible treble damage suit, and (5) the Department of Justice.

In summary, 67 new documents—not including 78 pages of duplicates—were produced in the treble damage suit from the files of McCook, Turnbull, and their several attorneys. 60 were completely new to Standard. 7 were copies of documents produced from the files of Turnbull or third parties in the prior suit, but with differentiating notations thereon.

Additionally, 12 new documents, plus 2 photographs, were produced in the treble damage suit from the files of the Department of Justice; the 12 documents, and the 2 photographs, originating from the files of Turnbull, were new to Standard. Of the 12 new documents, a copy of only one had been produced theretofore in the treble damage suit.

In total, 78 new documents, not including duplicates, were produced for Standard in the treble damage suit including 71 completely new documents, and 7 documents with differentiating notations thereon.

Finally, an additional 23 pages were copies of documents which McCook and Turnbull had not produced from their own files in the prior suit, but which Standard and the Department of Justice had obtained from other sources.

G. RELEVANCY OF DOCUMENTS NOT PRODUCED

The documents not produced for Standard in the prior suit contained information relevant to the issues tried by the District Court, and vital to Standard's defense. Indeed, the importance of some of these documents was recognized by Turnbull, who selected 21 of the new documents for review by the law firm in San Diego in connection with its analysis of a possible treble damage suit.

While it could not be expected that out of some 78 new documents, all would be of equal importance, there were a number of new documents which contradicted the testimony of Turnbull and, more importantly, of McCook which was cited in the Government's post-trial brief and adopted by the District Court in support of its findings. Moreover, the new documents put the testimony of these witnesses, and the interests of at least one other petroleum supplier considered by the Court, Shell, in a different light.

In the equity suit brought by the United States, the District Court found three principal types of illegal conduct by Standard which prevented other petroleum suppliers from entering the market in American Samoa:

(a) possession of the only petroleum facilities pursuant to a lease obtained illegally;

(b) restriction of the available market through requirements contracts; in this aspect of the suit, the issue was whether the supply contracts by Standard with two tuna canneries extended to, and obliged, the fishing fleets serving the canneries to purchase from Standard, or whether the fleets were free to purchase elsewhere;

(c) price reductions by Standard prior to 1965, and in July and October, 1965, which excluded other suppliers.

In the market as it existed in American Samoa 1956-1969, Turnbull and McCook were important figures. They came upon the scene and made a proposal to H. Rex Lee, the Governor of American Samoa, to construct petroleum storage facilities and supply petroleum products in spite of Standard's lease on the existing facilities and its supply contracts with the canners. In addition, the offer by McCook was made just after Standard's price reduction in July, 1965, for diesel fuel to the fishing fleets, and before a

similar price reduction for diesel fuel to the Government of American Samoa powerplant on October 25, 1965. In the prior suit, it was the position of the United States that these price reductions foreclosed McCook, and others, from American Samoa (A-734-735).

In the prior suit, McCook testified that he was "shot out of the saddle" after making an offer to supply a full line of petroleum products on August 13, 1965, to the Government of American Samoa, and that he did not hear from Governor Lee concerning the proposal (A-484-486). Without detailing all the information in the documents, we set forth a few significant instances in which the information now produced would have been useful to Standard.

1. Contradiction of Testimony:

In the District Court, Mr. McCook testified that because of the price reduction in July, 1965, to the fishing fleets, he was "shot out of the saddle" in Samoa; to quote the testimony:

> "Q. Was the only reason that you abandoned this is that Standard reduced the prices?
>
> "A. Because we were shot out of the saddle.
>
> "Q. Explain that.
>
> "A. We couldn't see any future. We couldn't sell it for as low a price as it appeared to be sold.
>
> "Q. In your letter to Governor Lee on August 13th you quoted a price of 11.25 per gallon for the diesel fuel to the fishing fleet; correct?
>
> "A. If that is what it says.
>
> "Q. If Standard was quoting 11.95, wasn't your price lower than Standard's?
>
> "A. What was it before that?
>
> "Q. It was 13.95.
>
> "A. It appears to me like we were fighting a losing battle because that was the first of what could have been several reductions in price. Obviously, I'm in no position to buck Standard Oil, and when Standard Oil reduced their price it did take a lot of sting out of it and evidently the governor might have had some pressure brought to bear • • •" (A-486-487).

However, the missing documents present a different picture:

(1) a letter dated October 5, 1965, from McCook to Governor Lee, not produced in the prior suit, shows that Mr. McCook was not dissuaded by any past or threatened price cut by Standard from entering the American Samoan market; it states:

> "I just wanted to drop you a note to let you know that I have the balance of the information we discussed on the telephone, covering our supplier's financial strength.
>
> • • • • •
>
> "I would like to point out to you that *we are definitely interested still* and we do feel we could save the Government of American Samoa a sizable amount in their fuel budget if the right terms could be reached, which, incidentally, are still along the lines we discussed" (SDX-246; A-189) (emphasis added).

(2) a letter dated November 16, 1965, from Governor Lee to McCook, not produced in the prior suit, shows that Governor Lee was still communicating with McCook concerning his proposal after Standard's October price reduction. It states:

> "We are still definitely interested in trying to improve our fuel oil distribution system. At the present we are exploring ways and means of obtaining a suitable site to carry out some harbor development for a

new fuel depot, and I am sure we will want to get back in touch with you in the very near future" (SDX-247; A-190).[23]

(3) a letter dated November 24, 1965, from Turnbull to Dillingham Corporation, not produced for Standard in the prior suit but which was sent to the Department of Justice by Turnbull after the judgment was affirmed by this Court, shows that a month after the last price reduction by Standard in October, 1965, Turnbull and McCook were still prepared to enter American Samoa, subject to the approval of Governor Lee; to quote the document:

> "My associates wish to create a new bulk petroleum facility in Samoa, complete with tankage of six million gallons, docking space for tankers and refueling facilities. With no available deep water frontage in Pago Pago harbor, it appears obvious that the development of Tafuna Bay is warranted • • •.
>
> • • • • •
>
> "Subject to the Governor's approval, my associates are ready to construct a $600,000. terminal" (SDX-4949; A-191).

23. At his deposition in the treble damage suit, McCook first said that all his petroleum documents were in a two-drawer file in his garage, from which documents were made available to Lynn in the prior suit, and that he had not found any other petroleum documents in the four-drawer file in his office at any time thereafter, despite numerous searches (A-496-501); on the second day of his deposition, McCook stated that the October 5, 1965 letter, SDX-246, was in the two-drawer file, but that the November 16, 1965, letter, SDX-247, was in the four-drawer file and was discovered within the last one or two years (A-515-518, 521, 522); on the third day of his deposition, he testified that both SDX-246 and SDX-247 were in the four-drawer file and were both discovered within the last one or two years (A-528-529), changing his prior testimony (A-515, 521-522).

At his deposition, Turnbull testified first that he did not know whether document SDX-246 was in his files in October, 1969 (A-587); that the document was in his files in October, 1969 (A-615-616); and finally, that it was not in his files in October, 1969 (A-619).

In the absence of the foregoing documents, the District Court failed to give any weight to one of the TU documents relied upon by Standard—TU-51, a letter dated November 15, 1965, to Governor Lee—in which Turnbull stated that he had a petroleum supply and was waiting for a response from Governor Lee to earlier proposals (A-51).

2. Change in Testimony:

In the prior suit, McCook testified with respect to his proposal to Governor Lee for petroleum supply, that he had no further contacts with Governor Lee after he submitted the proposal in a letter dated August 13, 1965. To quote the transcript:

> "Q. Did you contact Governor Lee after sending this letter or were you contacted by him?
>
> "A. No.
>
> "Q. Did you have any communications of any kind at all with Governor Lee after you sent this letter?
>
> "A. No, I never did" (A-484-485).

On documents not produced in the prior suit, McCook's handwritten notes contain the telephone number of Governor Lee, presumably at Washington, D.C. (A-200). In the treble damage suit, Turnbull has testified that these documents were prepared after the August 13, 1965, proposal (Tr., Turnbull Dep., December 2, 1975, p. 1184); McCook has now testified that he had one, perhaps two telephone calls with Governor Lee after submitting the proposal (Tr., McCook Dep., September 24, 1975, pp. 618-623; A-518-519).[24]

24. On these documents not produced (A-200-220), there were other notations made by Turnbull, including corrections or changes in computations, which did not appear on the partial set designated as TU documents (A-61, 81-87).

Because these documents were not produced, Standard was precluded from developing the facts or testing McCook's recollection.

3. New Evidence re Conspiracy with Canners:

SDX-320, 321 and 322 (A-221, 222, 223) were three copies of a document entitled "Briefing on Samoa Terminal," which McCook testified must have been prepared before, or around, the time of the August 13, 1965, proposal to Governor Lee (A-520-521). These documents were not produced for Standard in the prior suit. In that suit, it was the position of the United States, and the District Court so found, that the two canners, Van Camp and Star-Kist, had accepted price reductions from Standard in July, 1965, as part of a conspiracy to exclude other petroleum suppliers from Samoa. Documents 320, 321, and 322 are to the contrary. In paragraph 10, they recite that the fish companies were ready to consider dealing with McCook:

> "Preliminary agreement—all parties—before Lee returns to Pago.
>
> "a. Vince Evich [employee of canner Star-Kist] says *fish companies ready*. Lee to expedite and force agreement. Companies waiting for Lee to push deal" (A-221-223) (emphasis added).

4. Supply Contracts with Canners:

In the prior suit, the United States contended, and the District Court found, that the supply contracts between Standard and the two canners included, as a practical matter, the requirements of the foreign fishing fleets serving the two canners (A-764). This contention was vigorously contested by Standard, which offered evidence showing that it was the understanding of Governor Lee, and others, that the supply contracts with the canners did not require

the fishing fleets to purchase petroleum products from Standard. SDX-4708, a letter dated April 21, 1965 (A-172-173), written by Turnbull, not produced in the prior suit, shows that the purchases by the fishing fleets were treated as separate from purchases by canners; to quote the letter:

> "I have proposed to furnish [the Governor's] requirements providing Starkist, Van Camp • • • *and the fishing fleet representatives* agree, by contract, to enter into a long term agreement • • •" (A-172) (emphasis added).

5. Interest in American Samoa by Shell:

In the prior suit, Turnbull testified that the major oil companies he had contacted concerning American Samoa lost interest in the market, and were unwilling to supply or to compete on the Islands (A-474-475). Two letters recently produced from the files of the San Diego law firm show that Turnbull wrote Shell Company (Pacific Islands) Limited in July, 1965, proposing that Shell buy products from Turnbull and market them through its own facilities in American Samoa (A-177), and that in August, 1965, before the McCook proposal, Shell informed Turnbull that it would consider his suggestion and asked him to quote prices (A-183). Shell (Pacific Islands) Limited's continued interest showed that neither Standard's facilities lease, nor its supply contracts, precluded this Shell affiliated company from the market. In its post-trial brief, the United States argued that Shell had looked at the American Samoa market in 1964-1965, and decided not to enter at that time (A-734). The District Court found that Shell had been excluded from American Samoa by Standard's conduct (A-774). In so finding, the Court was unaware of Shell (Pacific Islands) Limited's interest, as shown by the documents not produced.

6. Information re Cross-Examination:

The documents not produced contained information, or leads, which would have been useful on cross-examination in the prior suit. The cross-examination would have developed new avenues of defense, and opened new lines of discovery. We give two examples:

First, in the deposition of Turnbull, Standard asked Turnbull about a telephone call with Mr. Galleon, Asiatic Petroleum, concerning petroleum supply in American Samoa in 1964 (A-44). Turnbull did not remember the name; to quote his testimony:

> "Q. Does that name mean anything to you, Mr. Galleon?
>
> "A. It sure as hell doesn't" (A-474).

Among the documents now produced in the treble damage suit is a letter dated June 5, 1964, from Turnbull to Mr. Paul Gallien, Asiatic Petroleum Corporation, New York, transmitting statistics from a survey made by another oil company for the South Pacific and stating:

> "I have your CIF prices into Fiji, New Caledonia, Western Samoa and New Guinea. *You could compete easily with SoCal in all products* [in American Samoa], and there are other incentives that I would care only to discuss in the event an educated interest was evidenced by your company" (A-152) (emphasis added).

Second, at deposition and later at trial, H. Rex Lee, Governor of American Samoa, 1961-1967, testified that he did not recall McCook (A-489-490). To quote his testimony at deposition:

> "Q. [Counsel for Standard]: Would you mark • • • a letter from • • • McCook to Governor Lee, dated August 13, 1965, and identified as TU 079.
>
> • • • • •

> "Tell me what you know about Mr. McCook, the Oceanic Petroleum Corporation, and his proposal.
>
> "A. I know virtually nothing about him.
>
> "Q. Do you know why he wrote this to you?
>
> "A. At this point I do not. I may have known it at the time.
>
> • • • • •
>
> "It is my recollection that his name was mentioned in relation to Summit. I have no knowledge of either Mr. Shaw [President of Summit] or of Oceanic other than what we have discussed in the last two days on the basis of documents that you have introduced.
>
> "Q. Do you know who Mr. McCook was?
>
> "A. No.
>
> "Q. Have you ever met Mr. McCook?
>
> "A. I don't recall meeting Mr. McCook. I could have. It's very possible" (A-488-489);

And at trial:

> "Q. Now, Mr. McCook was attracted to American Samoa through the efforts of Mr. Turnbull, was he not?
>
> "A. I do not know.
>
> "Q. You do not know?
>
> "A. I just do not recall Mr. McCook. • • •
>
> • • • • •
>
> "Q. Now, did you follow up on this proposal, Governor Lee, and have a meeting with Mr. McCook as he suggested in the last paragraph of the letter?
>
> "A. I simply do not recall whether I had a follow-up meeting with him or not. I may very well have. If I received a proposal of this kind, I would probably check it out. I may have discussed it with him on the phone. He may have come to Washington or Pago Pago to see me, but I just—I just do not recall it" (A-492).

The missing documents include a letter from McCook to Governor Lee discussing the August 13, 1965, proposal, and

a response thereto by Governor Lee (A-189, 190). Further, the unproduced documents contain references to at least one telephone discussion of the proposal by Governor Lee and McCook (A-189, 190, 200).

H. EXPLANATIONS FOR FAILURE TO PRODUCE DOCUMENTS

Two general categories of explanations have been given, to date, for the failure to produce documents in the prior suit. We discuss them separately below:

1. McCook, Turnbull, Lynn:

In the treble damage suit, plaintiff McCook admits that some of the documents not produced in the prior equity suit were in his files, but states that with two exceptions copies of these documents were given to his attorney, Lynn. He states that the two excepted documents would have been discovered had a thorough search been made.

Turnbull, the agent for McCook, has admitted that a number of documents not produced before were in his files, but states that he made his files and documents available to the Department of Justice.

Plaintiff's attorney, Lynn, had unproduced documents in his possession as late as September, 1975, but states that he was informed by McCook and Turnbull in the prior suit that there were no documents in their files in addition to TU-001 - TU-100, and that he was informed by the attorneys in San Diego that they had no additional documents. The law firm in San Diego had documents in its files not produced in the prior suit, but contends that it was not contacted by Lynn with respect to additional documents in the prior suit.

2. Justice Department:

It has not been the position of the Justice Department, or its trial attorney, that they were deceived by the failure of Turnbull to produce documents, or by the failure of McCook or Lynn to produce documents, or that Standard was not prejudiced by the failure to produce documents. Instead, the Justice Department and its trial attorney have taken two positions:

First, the trial attorney does not recall receiving any Turnbull documents in 1969, apart from the documents marked TU-001 - TU-100, and has already told all he knows in two affidavits (A-694, 701). Second, the recollection of the trial attorney is not in conflict with that of Mr. Turnbull, because Mr. Turnbull does not remember what happened in October, 1969.[25] We discuss each ground separately below:

a. EX-PARTE AFFIDAVITS

In two affidavits filed in the District Court, Central District of California (A-694-701, 701-711), the Department of Justice trial attorney disclosed that he had knowledge of the following facts concerning the production of documents:

> (a) Delivery of documents by Turnbull to the United States in October, 1969;
>
> (b) Receipt of additional documents by the United States from Winton, an attorney for Turnbull, in December, 1969;
>
> (c) Return of documents to Turnbull in November, 1969;
>
> (d) Request by the United States for approval of Turnbull to deliver documents to Standard in April, 1970;

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25. Government's Reply Memorandum in Support of its Motion for a Protective Order that Defendant's Notices of Deposition of the United States Department of Justice and Bernard M. Hollander, Esq., Be Vacated and the Discovery not Had dated March 10, 1976 ("Gov. Reply Mem."), p. 2, n. 1.

(e) Conversations with Lynn, attorney for Turnbull and McCook, concerning production of documents;

(f) Requests by the United States for documents from McCook's files; and

(g) Communications by the United States with Turnbull concerning documents after trial in the prior suit.

In the two affidavits, the trial attorney did not state that he had set forth his total knowledge on the subject matter. Instead, these representations were made in two memoranda filed by the Justice Department in support of the motion for a protective order.[26]

The second affidavit showed changes in testimony by the trial attorney from the time of the first affidavit. For example:

(i) In the first affidavit, the trial attorney stated that the documents provided by Mr. Turnbull were numbered TU-001 - TU-100, and returned to Mr. Turnbull in November, 1969 (A-697); in the second affidavit, the trial attorney stated that a document later received from Winton, an attorney for Mr. Turnbull, in December, 1969, was subsequently included in TU-001 through TU-100, when those documents were produced for Standard (A-707-708).

(ii) In the first affidavit, the trial attorney stated that he had one telephone call from Turnbull prior to October, 1969 (A-696-697); in the second affidavit, the trial attorney stated that he had further discovered, since the preparation of the first affidavit, that he had

26. In the first memorandum, the Department stated that [the trial attorney] "is clearly unable to shed any further light on Mr. Turnbull's production of documents" (First Mem., p. 9); in the second memorandum, the Department stated that "once again * * * Mr. Hollander has revealed all that he knows" (Gov. Reply Mem., p. 9); yet in the second affidavit attached to the second memorandum, Mr. Hollander set forth, in response to questions by Standard, facts not previously disclosed.

a second telephone call with Turnbull which apparently took place on October 22, 1969 (A-704). The second affidavit does not show what documents or persons refreshed the trial attorney's recollection as to the second telephone call;

(iii) In the first affidavit, the trial attorney identified certain documents as notes of telephone communications with Turnbull (A-701); in the second affidavit, the trial attorney changed his statement and said that one of the documents consisted of notes of a meeting with Turnbull (A-705).

Finally, the affidavits show that the trial attorney's recollection could be refreshed. For example, he stated that upon reading the Turnbull deposition he recalled that the meeting between Turnbull and him in October, 1969, for collection of documents, lasted about one-half hour (A-704).

b. DEPOSITION TESTIMONY BY MR. TURNBULL IN TREBLE DAMAGE SUIT RE PRODUCTION OF DOCUMENTS IN UNITED STATES SUIT:

When the Department of Justice stated that the substance of Mr. Turnbull's six days and 1,200 pages of deposition testimony was that Turnbull did not remember what had happened in October, 1969, the Justice Department overlooked two facts:

First, the deposition testimony of Turnbull covered more than just the events of his meeting in October, 1969, with the Justice Department trial attorney, at which documents were delivered to the Justice Department; the deposition testimony dealt with the return of documents from the trial attorney, with later searches by Turnbull for documents in 1970-1971, with discussions with the Department of Justice trial attorney in 1970 and 1973, and with detailed facts concerning the collection and delivery of documents in the prior suit to the Department of Justice.

Second, in stating that Turnbull does not remember what happened in October, 1969, the Department of Justice isolated some 32 lines out of 1,200 pages of deposition testimony, in which Turnbull testified that he did not remember whether the trial attorney, while at Turnbull's office in October, 1969, looked through the documents which Turnbull had provided to him, or whether the trial attorney excluded documents from the files set forth.

In some 70 pages of his deposition, Turnbull gave specific, detailed testimony concerning the meeting in October, 1969, with the Justice Department trial attorney, much of which was in conflict with the trial attorney's statements in his two affidavits. For example, Turnbull testified that he was contacted "out of the blue" by Mr. Hollander (A-556), that he collected eight or nine files for Mr. Hollander, and put them on his desk in a pile (A-557), and that the pile was six inches high (A-552); in addition, he testified that he provided loose documents to Mr. Hollander (A-561). As to the collection of documents by the trial attorney, Turnbull stated:

> "Q. Did Mr. Hollander look through the folders right in your office?
>
> "A. He glanced—yes, he glanced through them. Not—he didn't get down and study them, but he glanced through them and then put them in his briefcase.
>
> "Q. And took them with him?
>
> "A. And took them with him" (A-557-558).

Turnbull testified that the trial attorney stated that the files of Governor Lee were incomplete, and that the trial attorney wanted to take a look at Turnbull's complete file (A-555). Turnbull testified that the trial attorney asked to see all Turnbull's documents concerning petroleum products in American Samoa (A-556). Further, he testified:

> "When he took all of the material, he says, *'I am going to look through this file, and I am only going to take out what I want to take out of it.'* So he took it. Now, I get a package of stuff back to the office. So I stuff it in the file, and then my recollection is faintly that I got another one, but I was busy at the time, and I remember seeing something from the Justice Department. I stuffed that, too, as the balance of the papers" (A-566) (emphasis added).

Turnbull testified that he had provided documents concerning petroleum products in American Samoa to Lynn and to the law firm in San Diego, which had been employed by Lynn to investigate a potential treble damage suit. Turnbull testified that he did not deliver any documents to Lynn, or to the law firm in San Diego, that he did not deliver to the Justice Department trial attorney. He further testified that he did not show any documents to Winton, a lawyer consulted by him in November, 1969, which he did not deliver to Mr. Hollander. Yet, in the treble damage suit, documents were uncovered in the files of Lynn and the San Diego law firm which were not provided to Standard in the prior suit, and which in addition, Winton and his law clerk testified they reviewed in the prior suit. To quote the testimony by Mr. Turnbull:

> "Q. Did you supply to Mr. Jones [San Diego lawyer] any documents you did not provide to Mr. Hollander?
>
> "A. No, No.
>
> "Q. Did you provide to Mr. Lynn any documents you did not provide to Mr. Hollander?
>
> "A. No" (A-571).

And as to Winton:

> "Q. • • • Do you recall whether you delivered any documents to [a third lawyer, Medvane] at the meetin[g] [between Medvane, Winton and Turnbull]?

"A. I don't remember whether I did or not * * * *because my recollection is I had shown some documents to Winton.*

* * * * * * * *

"Q. * * * In the time sequence of your visit with Mr. Winton and Mr. Medvane [November, 1969] did you take to them any documents that you did not give to Mr. Hollander?

"A. No.

"Q. Was anything that they saw also seen by Mr. Hollander?

"A. Yes" (Tr., Turnbull Dep., November 24, 1975; A-567) (emphasis added).

Mr. Turnbull testified, in detail, as to some 52 documents not produced in the prior suit. He did not testify as to the remaining 26 documents not produced in the prior suit, because those documents were in the files of the law firm in San Diego and in the files of the Justice Department, and were not produced for Standard until after the Turnbull deposition. As to each document reviewed, Mr. Turnbull gave testimony as to whether it was in his files in October, 1969, and whether it was made available to the Department of Justice trial attorney. In many instances, Turnbull testified that the documents were in his files in October, 1969 (e.g., A-599-600, 602, 607-608, 612); he testified, without qualification, that certain of the new documents were made available to the Justice Department trial attorney (e.g., A-599-600, 601, 604, 608); that others, he believed, were made available to the trial attorney (e.g., A-602, 624); and that as to certain other new documents, he did not recall if he made them available (e.g., A-597, 605, 624).

Finally, Turnbull testified that he made searches of his files following the return of documents to him by the Justice Department in the prior suit (A-575, 588). He testified that

he did not find any documents in the files different than the documents provided to the Department (A-575-584, 589-590); he said that he did not look through the documents that he had received back from the Department of Justice. To quote the testimony:

"Q. And you didn't find any documents in those other files that were in addition to TU 1 to 100?

"A. Nothing that went to Hollander did I look through. I looked through some other files to find what apparently would have been new things, new discovery that I would find in other files, and I didn't find anything.

"Q. * * * [Y]ou didn't look through any of the documents that you got back from Mr. Hollander?

"A. No.

"Q. * * * Now, sir, is there any reason why you didn't look through the files you had gotten back from Mr. Hollander?

"A. Because it would—because I believed at the time or would have believed at the time that all those documents were already a matter of record.

"Q. Had already been given to Standard?

"A. Had already been done * * *" (Tr., Turnbull Dep., November 24, 1975, pp. 236-237; A-584).

In short, the Turnbull deposition statements conflict in important respects with the ex-parte affidavits of the Justice Department.

3. Justice Department: Post-Trial Documents:

The Justice Department acknowledges that it received two photographs and 12 new documents from Turnbull after the trial but before the hearing on relief. These included a document contradicting the finding proposed by the Government and entered by the Court that McCook had been excluded from Samoa. The United States now

takes the position that it did not disclose these documents to Standard because they were not relevant to the issues on relief (Gov. Reply Mem., p. 4-5, n. 4).

In addition, the Justice Department said that the 14 enclosures were "quite clearly" described in Turnbull's letter (A-436) to the Department of Justice which was forwarded to the Court and Standard, but were never requested by Standard (Gov. Reply Mem., pp. 4-5, n. 4; A-725).

In contrast to the position by the Department of Justice, the Court's order required it to produce all documents in its possession with respect to proposals by petroleum suppliers in American Samoa. And the letter from Turnbull which was sent to the Court and Standard did not show that the 12 enclosed documents concerned the period from 1963 to 1965; instead, the letter indicated that the documents referred to current business matters which the Department of Justice had suggested be kept confidential and not disclosed (A-436).

I. ARGUMENT

This motion requests the Court to recall its mandate and to enter an order granting leave to the District Court to consider a motion by defendant Standard to set aside the judgment of the District Court for fraud upon the Court, pursuant to Rule 60(b), Federal Rules of Civil Procedure. It is apparent from the documents produced in the treble damage suit that Standard was denied an opportunity to defend in the prior suit brought by the United States because of a withholding or suppression of documents, and that the procedures in the District Court for the Northern District of California were tainted. A litigant is entitled to a fair hearing which presupposes an opportunity to present all the facts available in support of his position; Standard

did not have this opportunity. The issues involved in this motion transcend the interests of the parties; they involve the integrity of the judicial process and its institutions. As stated by this Court in *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, where fraud involving an attorney was perpetrated upon the Patent Office and upon the Court of Appeals:

> "• • • tampering with the administration of justice • • • involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society" (322 U.S. 238, 246).

1. A motion pursuant to Rule 60(b)(6) is an appropriate remedy for fraud upon the Court:

A motion filed pursuant to Rule 60(b)(6), like a bill of review in equity, is an appropriate remedy to set aside a judgment for fraud upon the Court (*Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 248; *Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1963) 320 F.2d 594, 608-609; see *Toscano v. C.I.R.* (9 Cir. 1971) 441 F.2d 930, 933-935; *Root Refining Co. v. Universal Oil Products Co.* (3 Cir. 1948) 169 F.2d 514, 521-523, certiorari denied (1949) 335 U.S. 912; *Haggar Company v. United States* (Ct. Cl. 1955) 128 F.Supp. 404, 407). Fraud upon the court is the something more, or extraordinary circumstance, that warrants relief under Rule 60(b). As stated by this Court in *Klapprott v. United States* (1949) 335 U.S. 601, with respect to the nature of relief under Rule 60(b)(6):

> "It is contended that the 'other reason' clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under

the common law writs of *coram nobis* and *audita querela,* and that the facts shown here would not have justified relief under these common law proceedings. One thing wrong with this contention is that few courts ever have agreed as to what circumstances would justify relief under these old remedies. * * * In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (335 U.S. 601, 614-615).

Further, a motion pursuant to Rule 60(b)(6) is consistent with the public interest in the proper administration of justice (*Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1963) 320 F.2d 594, 608-609). Where a civil suit is brought by the United States under the antitrust laws, with severe civil penalties, the public interest is plain; it is: (1) requiring the United States to turn square corners in dealing with opposing litigants; (2) requiring the United States to conduct antitrust suits involving sweeping decrees with full candor and disclosure; and (3) careful scrutiny of challenged judgments, which have prospective effect under Section 5 of the Clayton Act, particularly where the conduct called into question involves interested participants such as McCook or his attorneys.

2. A motion to recall the mandate is not a mere ceremonial gesture; the motion must set forth evidence which, if true, warrants relief; this showing has been made in the present suit:

A motion to recall a mandate after an affirmation on appeal is not a mere ceremonial gesture. It must be supported by adequate evidence (*Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 248; *National Brake Co. v. Christensen* (1921) 254 U.S. 425, 430-433; *Bros Incorporated v.*

W. E. Grace Manufacturing Company (5 Cir. 1963) 320 F.2d 594, 602, n. 11). The appellate court has the right to be fully informed of all that has taken place, not to determine the issues finally, but to decide whether a Rule 60(b) hearing should be held.

In the treble damage suit, in a gradually unfolding chronicle of wrongful conduct in the discovery proceedings in the prior suit, Standard has discovered that there was a failure by McCook and Turnbull, and their attorneys, to produce relevant documentary evidence. The total facts have not yet been gathered because the deposition of Mr. Turnbull was completed before Standard discovered the new documents in the files of the Department of Justice and of the law firm in San Diego. The facts to date show the following:

(1) A failure by a material witness to produce documents in his possession, in response to a subpoena duces tecum—this witness, at the time he failed to produce such documents, contemplated filing, and has since filed, a treble damage suit against Standard, pleading the Government decree as *prima facie* evidence;

(2) A failure by a second material witness, who was an agent or partner of the first witness, to produce documents in his possession, in response to repeated requests by Standard;

(3) A failure by an attorney who was retained by the first witness in connection with a possible treble damage suit, and who represented the second witness incident thereto, to produce documents from both witnesses in his own files, in response to subpoena duces tecum, with representations by the attorney that there were no further documents in the files of the first or second witness;

(4) A failure by the Department of Justice to produce for Standard documents received from one of the witnesses post-trial, despite representations to Standard prior to trial that it knew of no additional documents, and despite knowledge that the witness, in making the same representation to Standard, had not been telling the truth; and

(5) A failure by the Justice Department, if one of the witnesses is telling the truth, to produce documents delivered to the Department of Justice prior to trial.

Whether taken singularly or together, these facts warrant relief.

a. A FAILURE TO PRODUCE DOCUMENTS IN RESPONSE TO SUBPOENA DUCES TECUM, NO LESS THAN A FAILURE BY A PROSECUTOR TO PRODUCE DOCUMENTS IN HIS POSSESSION OR CONTROL IN RESPONSE TO A REQUEST BY ONE OF THE PARTIES, IS A PERVERSION OF THE JUDICIAL PROCESS WHICH WARRANTS RELIEF UNDER RULE 60(b):

As stated in *Blackmer v. United States* (1932) 284 U.S. 421, dealing with the general duties of a citizen in response to a subpoena:

> "It is • • • beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony • • •" (284 U.S. 421, 438).

In the present suit by the United States, there was a failure by two material witnesses, McCook and Turnbull, to produce documents in their possession, or in the possession of their attorneys. This failure was aggravated by three additional facts:

> *First,* there was a failure to produce not just one or two documents, but a series of documents spread, in varying degrees, throughout the files of McCook, Turnbull, and two of the attorneys consulted by them;

> *Second,* the documents were not lying undiscovered in the files or overlooked, but a number were taken from the files by Turnbull and forwarded to attorneys for their analysis in connection with a possible treble damage suit;
>
> *Third,* certain of the documents were in the files of an attorney who represented to Standard that there were no further documents.

The testimony by McCook and Turnbull was material to the issues tried. The United States cited, and quoted, testimony by McCook in its post-trial brief (A-735); in its findings, the District Court referred specifically to McCook's testimony (A-774). But the testimony was misleading, and incomplete. In similar circumstances, where there was perjury committed by three non-party witnesses, the Court of Appeals ordered that the judgment be set aside on a motion pursuant to Rule 60(b); to quote the Court:

> "• • • [T]he district court concedes that the testimony of these persons at the trial was part of the evidence upon which the judgment under attack was based. We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be *weighed,* on a motion to set aside the judgment. This seems self evident. • • • [I]t was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice. Thus, in that event, this taint had affected the entire proceeding in the court below, although we find no indication that any counsel herein was a party to any wrongdoing" (*Peacock Records, Inc. v. Checker Records, Inc.* (7 Cir. 1966) 365 F.2d 145, 147, certiorari denied (1967) 385 U.S. 1003).

In short, because there was only a partial disclosure of the facts by two material witnesses, McCook and Turnbull, and

a distortion of the facts in their testimony, the judgment should be set aside. This is particularly true where, as here, a witness who failed to make disclosure intended at the time to use, and since has sought to use, the decree in the suit by the United States to support a treble damage action.[27]

b. A FAILURE BY THE UNITED STATES TO PRODUCE DOCUMENTS DELIVERED TO IT BY TURNBULL, PRIOR TO TRIAL, WAS A DENIAL OF DUE PROCESS; THERE IS PRIMA FACIE EVIDENCE THAT TURNBULL DELIVERED DOCUMENTS TO THE UNITED STATES, WHICH WERE NOT DELIVERED IN TURN TO STANDARD:

The United States in a civil suit, no less than in a criminal action, has a duty to present evidence to the District Court which is not false or misleading. This duty is mandated by the fairness requirement of the due process clause, and is inherent in the general obligation of the Department of Justice to seek justice above victory. As stated by this Court in *Berger v. United States* (1935) 295 U.S. 78, 88:

> "The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty * * * whose interest * * * is not that it shall win a case, but that justice shall be done."

A suppression by the United States of material evidence, requested by defendant, violates due process and requires a new trial (*Brady v. Maryland* (1963) 373 U.S. 83, 86-88). In the present suit, the Department of Justice produced for Standard prior to trial certain documents which it had received from Turnbull, the witness. Despite subsequent requests by Standard, the United States informed Standard that it did not receive other documents from the Turnbull files.

27. At a minimum, regardless of the disposition of these proceedings with respect to the United States, if the mandate is recalled the District Court should strike Finding 67 to the extent it relates to McCook (see *District of Columbia v. Stackhouse* (D.C. Cir. 1956) 239 F.2d 62, 65) and deny prospective effect of the judgment to McCook (see *Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, 815-816).

In the treble damage suit, Mr. Turnbull has identified specific documents made available to the Department of Justice, prior to trial, not later produced by him or by the Justice Department for Standard. Further, Turnbull, testifying generally as to documents made available to private lawyers prior to trial, stated that he did not deliver to these lawyers any documents not delivered to the Department of Justice. In the files of two of these lawyers were documents not produced for Standard. The documents were exculpatory.

The Department of Justice has stated that it does not recall receiving the other documents; but if the testimony by Turnbull is true, the judgment must be set aside irrespective of the good faith or bad faith of the Justice Department. As stated by this Court:

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him, or reduce the penalty, helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though * * * his action is not 'the result of guile' * * *" (*Brady v. Maryland* (1963) 373 U.S. 83, 87-88).

The District Court should determine who is telling the truth. If the District Court determines that Turnbull, McCook, or Lynn produced documents for the Justice Department which were not in turn delivered to Standard, the judgment should be set aside. If the District Court determines that Turnbull deceived the Department of Justice, as well as Standard, this will be further evidence of fraud by Turnbull, which likewise warrants relief.

c. THE FAILURE BY THE UNITED STATES TO PRODUCE FOR STANDARD NEW DOCUMENTS RECEIVED POST-TRIAL REQUIRES THE JUDGMENT TO BE SET ASIDE:

The United States, although not soliciting false evidence, has a duty not to permit false material evidence to go uncorrected in the record when it appears (*Napue v. Illinois* (1959) 360 U.S. 264, 269; *Giglio v. United States* (1972) 405 U.S. 150, 153). Less than a year after the judgment of the District Court, when Standard might have moved in this Court to recall the mandate and for leave to file a motion to set aside the judgment of the District Court pursuant to Rule 60(b)(2) for newly discovered evidence, or pursuant to Rule 60(b)(3) for fraud or misrepresentation, the United States received documents from Turnbull which had not been disclosed to Standard prior to trial, which showed that Turnbull had not been telling the truth when he represented, through Lynn, that there were no documents in addition to TU-001 to TU-100. One of the documents contradicted the testimony of McCook with respect to his exclusion from American Samoa upon which the Justice Department based its proposed finding of fact which, later, was adopted by the District Court. Instead of disclosing these documents to Standard or the District Court, the United States returned them to Mr. Turnbull, keeping undisclosed copies in its files.

If the failure by the United States to inform the Court and Standard of the existence of the new documents, while retaining a set of the documents for its own files, was not intentional, the failure to disclose one of those documents whose exculpatory value for Standard could not have escaped the attention of the United States was a negligent suppression which warrants setting aside the judgment of the District Court, either for denial of due process (*Brady v. Maryland* (1963) 373 U.S. 83), or in the exercise of this

Court's supervisory jurisdiction (*United States v. Consolidated Laundries Corporation* (2 Cir. 1961) 291 F.2d 563).

In *Consolidated Laundries,* where the defendant discovered after trial 43 unnumbered documents in the Justice Department files which were material to the conduct of the defense, the Court of Appeals ordered that a new trial be granted; it pointed out that despite the contention by the Justice Department that some of the documents would have strengthened the prosecution, the documents would have been of obvious benefit to defense counsel in cross-examination of the principal witness. The Court stated:

> "It is, of course, impossible to know whether the result of the trial would have been different if defense counsel had had the [missing] documents. No one can tell what might have developed had the Government's principal witness been confronted with them during cross examination, or if certain of the documents had been available to refresh his recollection about facts which he did not remember and which, if elicited, might have been helpful to the defendants. As stated in Clancy v. United States, 365 U.S. 312, 316 * * *: 'Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively' " (291 F.2d 563, 570).

Further, the assertion by the Justice Department that it was under no court order to produce these documents, and that Standard had not specifically requested them, is no excuse. During the trial in the prior suit, Standard had repeatedly requested such types of documents, and had obtained an order from Judge Conti after trial requiring the Department of Justice to deliver documents sent to it by third parties on the issue of relief, which extended to the enclosures submitted by Turnbull. The Justice Department improperly took it upon itself to determine what was relevant, giving the Court's order the narrowest effect (see

e.g., *Lee v. United States* (9 Cir. 1968) 388 F.2d 737, 740; *United States v. DeMarco* (C.D.Cal. 1975) 407 F.Supp. 107, 112). The Justice Department had a duty to disclose the new evidence, not to weigh its impact:

> "The question is whether or not the document could have been used by the defense * * *. That is a question for the judge and jury. By suppressing this evidence, the [Federal prosecutor] attempted to become the trier of fact. That is not the prosecutor's function. His duty is to provide exculpatory evidence to the defense and then seek to rebut it before the trier of fact. It is not the prosecutor's function to structure a proceeding in such a way that exculpatory material is concealed from the defense, the court, and the jury" (*United States v. DeMarco* (C.D.Cal. 1975) 407 F.Supp. 107, 112).

3. The District Court should take evidence and enter findings concerning the failure to produce documents:

While the evidence shows plainly that McCook, Turnbull, and Lynn failed to produce documents in their files demanded by subpoena duces tecum and requests by Standard, the District Court should be permitted to take evidence concerning the production of documents by Mr. Turnbull for the Department of Justice. In *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 249, n. 5, this Court noted that material questions of fact raised by charges of fraud could not be finally determined, if disputed, on ex-parte affidavits without examination and cross-examination of witnesses.[28]

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28. In *Hazel-Atlas* this Court reserved decision on whether if the facts relating to fraud were in dispute and difficult of ascertainment, the appellate court should have held hearings and decided the case or should have sent the case to the District Court for decision (322 U.S. 238, 249-250, n.5). Subsequent appellate court rulings have usually followed the practice of sending the case to the District Court (e.g., *Wilson Research Corp. v. Piolite Plastics Corp.* (1 Cir. 1964) 336 F.2d 303, 306; *Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1963) 320 F.2d 594, 609).

CONCLUSION

For the foregoing reasons, the motion should be granted.

Dated: June 21, 1976.

Respectfully submitted,

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ADDENDUM

1. Discovery Proceedings: United States Suit: Pretrial:

We set forth below, in outline form, the discovery proceedings in the suit by the United States prior to trial:

	Date	Chronology of Events
a.	September 30, 1969	Complaint filed;
b.	October 29, 1969	Hollander meets Turnbull in Los Angeles; collects files and/or loose documents; notes that McCook has file with proposal for Governor Lee re petroleum facility in Samoa (A-271, 273-275, 431);
c.	November 3, 1969	Hollander returns three files to Turnbull; returns originals of documents numbered TU-001-TU-100[29]; requests Turnbull to forward copy of proposal for bulk petroleum plant in Samoa retained by McCook (A-274-275, 431);
d.	October, 1969-November, 1969	Turnbull delivers *one or two grocery boxes* of documents — *more than the 100 pages in TU-001 - TU-100* — re petroleum in American Samoa to Howard L. Winton, Esq., Los Angeles, for evaluation of potential treble damage suit against Standard; documents reviewed by Winton; also reviewed by Jerrold Gross, law clerk for Winton (A-654-655, 667-669);
e.	November 17, 1969	Hollander interviews Turnbull re Turnbull's, Standard's Samoan activities (A-757);

29. TU-001-TU-100 are the documents from Turnbull's files delivered by the United States to Standard during pre-trial discovery; these documents are reproduced in the appendix to this motion (A-1-100).

Date	Chronology of Events
f. December 11, 1969	Hollander receives document from Winton, from files of Turnbull (A-278);[30]
g. April 1, 1970	Hollander requested by Mussman, counsel for Standard, to provide documents in Justice Department possession concerning petroleum supply, distribution, sale in American Samoa (A-267-270, 282);
h. April 13, 1970	Hollander sends Mussman TU-001 - TU-100 (A-283);
i. May 20, 1970	Counsel for Standard interview Turnbull, Los Angeles; Turnbull to file multi-million dollar suit against Standard, based upon outcome of Government suit; Turnbull to be represented by lawyer; interview terminated;
j. August 15, 1970	Turnbull mails documents to Sullivan, Marinos, Augustine & Delafield, law firm in San Diego employed by Lynn to evaluate possible treble damage claim for Turnbull-McCook; *envelope contains 64 pages of documents, including —apart from 23 pages of documents in set TU-001 - TU-100 —41 pages of documents not in set TU-001 - TU-100* (A-286, 287, 641);
k. August 19, 1970	Law firm in San Diego mails Lynn photocopy set of the 64 pages of Turnbull documents;

30. The Justice Department has identified this document from Winton as a two-page letter included in set TU-001 - TU-100, numbered TU-079-080, but is unable to state with certainty that nothing else was received from Winton (A-754).

Date	Chronology of Events
l. October 1, 1970	Deposition of Turnbull, Los Angeles; Turnbull represented by Lynn; Lynn produces 13 pages of documents from photocopy set (A-101-113, 303-306)—not included in TU-001 - TU-100 — does not produce other 28 pages of documents in photocopy set which were not in TU-001 - TU-100; Mussman requests additional search of Turnbull files; Hollander objects, unless Mussman specifies missing documents; Lynn agrees to make search (A-319-321);
m. November 9, 1970	No word from Lynn on search; Mussman requests Lynn report on status of search; requests all petroleum documents, including specific documents referred to by date at Turnbull deposition (A-322-324);
n. December 14, 1970	Lynn sends copy Turnbull deposition to law firm in San Diego; refers to request for documents by Mussman; states that prior to forwarding documents to Mussman, will ask approval of law firm (A-325);
o. December 31, 1970	Notice of Deposition of Raymond C. Turnbull by Standard; Turnbull to be subpoenaed to bring all writings prepared between July 1, 1956 - December 31, 1971, that refer in any way to storage, purchase, sale, distribution or use of petroleum products in American Samoa,

Date	Chronology of Events
	except documents TU-001 - TU-100 previously produced (A-326-327);
p. January 13, 1971	Lynn informs Mussman no further documents in Turnbull files; Turnbull deposition cancelled; letter to Mussman from Lynn (copies to Hollander, Turnbull):

"You have this writer's assurance that there is nothing in the files of Mr. Raymond C. Turnbull respecting those items referred to in your deposition heretofore noticed for January 22, 1971. Those documents previously marked TU-001 through TU-100 constitute the totality of the Turnbull file respecting the above matter" (A-328) (emphasis added);

Date	Chronology of Events
q. January 18, 1971	Hollander-Lynn telephone call re Turnbull deposition; Lynn states no other documents (A-329);
r. January 26, 1971	San Diego law firm sends Lynn copies of letters dated August 13, 1965, and August 25, 1965, from Turnbull files, included in set TU-001 - TU-100; statement by law firm that upon reading letters, it became evident that something occurred between McCook and Lee during week of August 25, 1965; needed to be explored (A-330);
s. February 19, 1971	Transmittal by Lynn to Turnbull of January 26, 1971, letter from San Diego law firm, with attachments; *undated Turnbull handwritten note on letter dated February 19, 1971* (A-334), *refers to letter dated October 5, 1965, McCook-Lee, and subsequent letter, Lee-McCook; letters referred to not in set TU-001 - TU-100* (A-189-190, 334);
t. March 3, 1971	Standard locates McCook, Palm Springs; McCook represented by Lynn; has files related to petroleum supply American Samoa; Lynn to make files available March 9, 1971;
u. March 8, 1971	Standard informed by Lynn that all McCook documents not available for inspection on March 9; Standard to notice McCook's deposition (A-335);
v. March 9, 1971	Notice of Deposition of Richard B. Lynn, 9:00 a.m., March 22, 1971, Los Angeles, California; William R. McCook, 10:00 a.m., March 22, 1971, Los Angeles; subpoenas duces tecum issued for McCook, Lynn (A-336-343);
w. March 15, 1971	Standard changes dates of depositions to Tuesday, March 23rd, from Monday, March 22, 1971, because of inability to serve McCook with subpoena duces tecum (A-345);
x. March 15, 1971	Lynn suggests breakfast meeting to McCook, Turnbull, prior to depositions for purpose of review; suggests meeting by McCook, Lynn, with San Diego attorney and possibly Hollander on March 23, 1971, following depositions (A-344);

Date	Chronology of Events
y. March 18, 1965	Amended notice of deposition for Lynn, McCook; subpoenas duces tecum issued, served on Lynn, McCook (A-357);[31]
z. March 23, 1971	9:00 a.m., Lynn deposed (A-360-381); no documents produced; employed 6-7 months to represent McCook re possible litigation against Standard with respect to petroleum in American Samoa; documents delivered to Lynn by McCook, Turnbull; Lynn repeats statement documents previously marked TU-001 - TU-100 constitute totality of file; same statement made for each paragraph of subpoena; testimony re documents in files of law firm in San Diego:

"Q. Do you recall telling [counsel for Standard] last week that certain documents were in the possession of Mr. Sullivan and Mr. Jones in San Diego and

31. Attachment "A" to each subpoena duces tecum described the following documents required to be produced:

"(1) All documents which pertain in whole or in part to the storage, purchase, sale, distribution, or use of petroleum products in American Samoa;

"(2) All documents which pertain in whole or in part to the financing of the storage, purchase, sale, distribution, or use of petroleum products in America Samoa * * *;

"(3) All documents which pertain in whole or in part to contacts or dealings concerning the storage, purchase, sale, distribution, or use of petroleum products in American Samoa with:

(a) The Government of the United States, the Government of American Samoa, or their representatives;

* * * * *

(c) Producers, refiners, suppliers, jobbers, wholesalers, retailers, or transporters of petroleum products, or representatives thereof" (A-352-357);

you did not have them in your possession, documents that have been delivered to you by Mr. McCook?

"A. I think what I said * * * was that I was not completely comfortable at that time with the unequivocal statement * * * that everything was in this office or had been previously made a part of the earlier deposition. I'm saying to you now I am comfortable in that feeling. In other words, I've had a chance to review the things and think that I can make the same statement with reference to each of these subparagraphs as I did in my letter to your office on January 13th.

"Q. In other words, *is what you are telling me is that the documents that have previously been produced and numbered TU-001, et cetera, are all the documents in your possession or control or under the possession or control of Sullivan, Augustine, in San Diego that relate to the various paragraphs of the subpoena?*

"A. *Yes, I can make that representation*" (A-368-369) (emphasis added);

Testimony re Department of Justice:

"Q. Have you made copies of any of these documents and delivered those copies to the Department of Justice?

"A. No. I think—excuse me.

"Mr. Hollander, I don't think there is any secret about the file.

"MR. HOLLANDER: As you said on the record and as Mr. Turnbull said on the record, the documents made were numbered by the government TU-100" (A-369);

Date	Chronology of Events
aa. March 23, 1971	10:15 a.m., McCook deposed (A-382 - 392); no documents produced; file with correspondence concerning petroleum venture delivered to Lynn 7 months earlier; Lynn retained to represent McCook re pos-

Date	Chronology of Events
	sible suit against Standard; McCook retained no documents that fit subpoena description; might be few miscellaneous documents filed elsewhere; not looked in files to see if there were documents (A-382-392); testimony, statement re other files:

"Q. Where are those files?

"A. It would be miscellaneous correspondence files. They would be in my office.

"MR. LYNN: *I think it is fair to state that I made more than a cursory examination of Mr. McCook's files recently, that is, within the last 10 days, and I could find nothing in addition to that which had already been delivered here.*

"[Counsel for Standard]: *You are referring to the files at his office?*

"MR. LYNN: *I am referring to the single four-drawer file which is in his office and which contains myriad of subfiles and I went through each one individually*" (A-388) (emphasis added);

Date	Chronology of Events
bb. March 23, 1971	Meeting Hollander, McCook, Lynn; transmittal by Lynn to San Diego law firm of document entitled: "Content," TU-081 - TU-097 (A-393).
cc. March 25, 1971	Meeting by Hollander with lawyer from San Diego firm (A-426).
dd. March 26, 1971	Acknowledgment to Lynn by San Diego law firm re receipt of requested documents from Lynn (A-394);

Date	Chronology of Events
ee. March 29, 1971	*J. T. Shaw deposed,* New York City; Thailand petroleum refiner; subpoena duces tecum; *copies of 1965 letters, Shaw to Turnbull, McCook, produced;* these documents not included in set TU-001 - TU-100 (A-395-396);
ff. April 3, 1971	*Lynn informed by Standard new Turnbull, McCook documents produced at Shaw deposition;* requested to make further search of Lynn, Turnbull, McCook files to determine if any further documents responsive to prior subpoenas (A-395-396);
gg. April 12, 1971	Inquiry to Lynn by Standard re search; to proceed by deposition, subpoena if no reply (A-397);
hh. April 15, 1971	Turnbull, Lynn depositions noticed for Monday, April 19, 1971, pursuant to subpoena duces tecum; Hollander informed by Lynn that Standard to settle for letter from Lynn re further documents (A-398-405);
ii. April 16, 1971	Hollander notified by Standard re statement by Lynn:

"Lynn advises after further conference with Messrs. McCook and Turnbull they have no further documents responsive to our subpoenas. *Lynn • • • advises that Turnbull turned over his entire file to you from which you extracted documents numbered TU-001 - TU-100.* Do you have missing documents in your possession? Please advise at once" (A-406) (emphasis added).

Date	Chronology of Events
jj. April 16, 1971	Hollander notified depositions of Lynn and Turnbull cancelled; notice states: assume you will provide other missing documents (A-407);
kk. April 19, 1971	Telephone message Hollander to Mussman; oral report Department of Justice provided Standard with all Turnbull documents received (TU-001 - TU-100) (A-408);
ll. April 19, 1971	Letter outline to Hollander by Standard re events leading to depositions noticed for Lynn, Turnbull; statement re documents produced by Department of Justice:

"Our telegraphic request was to find out if there were to your knowledge any documents produced from the Turnbull-McCook files for your inspection which you did not copy and produce for us because you believed that they were irrelevant or immaterial to the issues in the case. * * * There was no intent to suggest that the Government might be withholding documents; the inquiry was designed to find out if you would stipulate to a production of documents (if any) which you saw or received from Turnbull-McCook and which you did not include in the set numbered 'TU-001 - TU-100' " (A-412).

Next to last paragraph of letter: inquiry whether Hollander received, reviewed, documents other than TU-001 - TU-100:

"From our telephone conversation this morning, I understand that you did not receive or review any documents from the files of Mr. Turnbull or Mr. McCook which are not included in the set of documents which you have marked as 'TU-001 - TU-100.' Your confirmation of this fact is certainly all that we need to cover the one unexplored avenue suggested by Mr. Lynn" (A-413).

Date	Chronology of Events
mm. April 23, 1971	Telegraphic notice to Mussman from Lynn; McCook, Turnbull files searched; no further documents; telegram states:

"REF MARKETING PETROLEUM AMERICAN SAMOA. PLEASE BE ADVISED MESSRS. TURNBULL AND McCOOK FILES EXAMINED WEEK ENDING APRIL 17, 1971. YOU HAVE MY ASSURANCE THAT THERE ARE NO FURTHER DOCUMENTS. THIS ASSURANCE IS UNEQUIVOCAL AND IS IN NO MANNER DEPENDENT UPON MY INDEPENDENT JUDGEMENT RESPECTING RELEVANCE" (A-414).

Date	Chronology of Events
nn. April 23, 1971	Transmittal by Lynn to Hollander of copy of April 23, 1971, telegram to Mussman (A-415).[32]
oo. April 23, 1971	Partial response by Hollander to April 19, 1971, Mussman letter; no response to next to last paragraph:

"This is in response to one aspect of the matters discussed in your letter of April 19, 1971; namely your suggestion that further depositions with Messrs. Lynn and Turnbull might still be held with our concurrence even though the April 19 cutoff date for discovery has passed. * * * However, *since it is our understanding that Mr. Lynn has again searched the relevant files and found no additional responsive documents, there seems to us to be no reason for further depositions of*

32. In the treble damage suit, Lynn testified that he had telephone discussions with Mr. Hollander in the period April 15, 1971-April 23, 1971, concerning the search for documents and the telegram dated April 23, 1971, sent to Mussman (Tr., Lynn Dep., October 14, 1976, p. 122; A. 545).

either Messrs. Lynn or Turnbull. Unless there is some justification for taking yet a third deposition on the same subject matter, we hope that by now you have decided not to further interrogate Messrs. Lynn and/or Turnbull" (A-417-418) (emphasis added);

	Date	Chronology of Events
pp.	April 26, 1971	Transmittal Mussman to Hollander of contents of April 23, 1971 telegram; request to Hollander to confirm that he had seen no additional documents:

"Upon your confirmation of the understanding which I described in the penultimate paragraph of my letter to you of April 19, 1971, I will be content to rely on the record without any further testimony from Messrs. Lynn, Turnbull, and/or McCook. May I hear from you promptly" (A-419);

	Date	Chronology of Events
qq.	May 3, 1971	Hollander response to Mussman letter April 26; failure by Hollander to confirm no receipt or review, on his part, of documents from Turnbull-McCook files not included in TU-001 - TU-100:

"We have no reason to question Mr. Lynn's veracity and would have assumed that the repeated assurances to you, both on the record and off, would by now have put an end to your anxiety. In any event, there does not now appear to us to be any sound basis for pursuing the matter further" (A-420);

	Date	Chronology of Events
rr.	May 5, 1971	Request to Hollander by Mussman for confirmation that Hollander had not received, reviewed Turnbull-McCook documents other than TU-001 to TU-100:

"I * * * have your letter of May 3, 1971. You still have not confirmed the understanding which I expressed in the penultimate paragraph of my letter to you of April 19, 1971, and which I again requested in my letter of April 26, 1971" (A-421);

	Date	Chronology of Events
ss.	May 13, 1971	Representation to Mussman by Hollander re documents:

"This is in response to your letter of May 5, 1971. As we have repeatedly stated to you, we recall no documents provided to the Government by Mr. Turnbull which were not marked with TU identification, returned to Mr. Turnbull and provided for your use" (A-422);

	Date	Chronology of Events
tt.	May 17, 1971	Transmittal Hollander to Lynn of May 13, 1971, Hollander letter to Mussman (A-423);
uu.	May 18, 1971	Response by Mussman to Hollander letter:

"I appreciate your written confirmation that the Government saw no Turnbull documents other than those which have been marked with a 'TU' identification. As you know, Mr. Turnbull has said that he is contemplating an action against Standard (apparently based upon the allegations of the Government complaint) and, for this reason, the rather incongruous absence from his files of documents which we located elsewhere gave me concern" (A-425);

	Date	Chronology of Events
vv.	July 30, 1971	Telephone call Lynn-Hollander; unclear whether documents discussed (SDX-535; Tr. Lynn Dep., October 14, 1975, p. 136):

Date	Chronology of Events
ww. February 16, 1972	Lynn transmits to Turnbull all documents in Lynn's office (A-427);[33]
xx. March 17, 1972	Notice Lynn to San Diego law firm: "totality of the file documentation previously in my office" now in Turnbull possession (A-428-429);

2. Discovery Proceedings: United States Suit: Post Trial:

We set forth below, in outline form, the discovery proceedings in the suit by the United States following trial:[34]

Date	Chronology of Events
a. July 20, 1973	Return to Turnbull by Hollander of set of documents numbered TU-001 to TU-100; copies of documents, originals of which were provided to the Department of Justice on October 29, 1969, returned to Turnbull November 3, 1969 (A-431);
b. August 16, 1973	Request Turnbull to Hollander for San Francisco office, Antitrust Division, Department of Justice, to make Government files available to attorney for Turnbull (A-432);
c. August 23, 1973	Acknowledgment Hollander to Turnbull re request for files; instructions to San Francisco

33. Lynn retained originals or copies of 21 Turnbull documents (28 pages) which included 7 documents (8 pages) not included in TU-001 - TU-100 (see p.68, infra).

34. As previously noted, the United States suit went to trial in June 1972; the judgment was filed December 12, 1972, and affirmed June 4, 1973.

Date	Chronology of Events
	office, Antitrust Division, to make available the pleadings of public record (A-433);
d. August 27, 1973	Communication Department of Justice, San Francisco office, with Turnbull attorney; not clear whether documents discussed (A-433);
e. September 19, 1973	Request to Turnbull by Hollander to provide comments, suggestions, re plan for sharing petroleum storage facilities in Samoa proposed by Standard for hearing on relief (A-434);
f. October 4, 1973	Letter to Hollander from Turnbull transmitting comments on plan; 14 documents enclosed: 2 photographs, 12 letters or memoranda, prepared in time period 1963-1965, not produced prior to trial; one letter, enclosure 11, dated November 24, 1965, stated:

"My associates wish to create a new bulk petroleum facility in Samoa, complete with tankage of six million gallons, docking space for tankers and refueling facilities. With no available deep water frontage in Pago Pago harbor, it appears obvious that development of Tafuna Bay is warranted."

* * * * *

"Subject to the Governor's approval, my associates are ready to construct a $600,000. terminal" (A-454).[35]

35. In addition to enclosure 11, two other documents referred expressly to petroleum storage in Samoa: enclosure 3, a two-page letter dated November 21, 1963, to Dillingham Corporation, referred to negotiations by Turnbull with Unoco to build a bulk plant for petroleum products near Pago Pago harbor (A-440-441); enclosure 7, a three-page letter dated December 10, 1963, referred to a petro-

Date	Chronology of Events
g. October 10, 1973	Notification to Judge Conti by Roger Nichols, Esq.: Kindel & Anderson retained by McCook and Turnbull in connection with proposal to enter American Samoa, and related matters;[36]
h. October 18, 1973	October 4, 1973, Turnbull letter acknowledged by Hollander; 14 enclosures dealing with alternate storage location, Nu'uli Lagoon, returned to Turnbull by Hollander; duplicate set of 14 enclosures retained in Justice Department files; transmittal states:

"I am returning herewith the 14 enclosures which I assume you will wish to keep as part of your files. They are not required by the Government at the coming relief hearing in American Samoa" (A-458) (emphasis added).[37]

Date	Chronology of Events
i. October 23, 1973	Hearing American Samoa re plan to provide storage facilities on a shared-cost basis; order to provide documents from other suppliers to Standard:

leum storage facility to be constructed by Union in Samoa, to a possible refinery in Samoa, and to the benefits from a refinery (A-446-448). The remaining nine documents dealt with plans to dredge a site for petroleum storage at a lagoon, near the airport in Samoa (A-437-439, 442-445, 449-453, 455-457).

36. The letter dated October 10, 1973, to Judge Conti, stated: "You may recall that Mr. McCook and Mr. Turnbull had a proposal pending in late 1965 to provide petroleum products for American Samoa customers."

37. With one exception, a letter dated December 10, 1963 (A-135-137, 446-448), these documents were not produced by Turnbull in the treble damage suit.

"Mr. Mussman: May I just suggest if there is correspondence with the government from companies who say they consider the program that we have proposed to be workable * * * I would think that would be of relevance. * * *

"Mr. Hollander: I don't want to mislead you. There is no great bulk of correspondence. Mostly the companies said—

"Judge Conti: Why don't you do this: *If there are any letters along that nature, send copies to Mr. Mussman.* If you feel they are of such a nature you don't feel they should be sent to Standard, send them to the Court and I will read them in camera and determine at that point.

"Mr. Hollander: I should ask the companies' permission, or ask them to write up something I could give to Mr. Mussman.

"Judge Conti: If they write a letter to you in confidence because of certain business secrets they might have, or certain procedures, then just let me read it in camera and decide" (A-459-462) (emphasis added);

Date	Chronology of Events
j. November 7, 1973	Notification Nichols to Hollander on behalf of Turnbull-McCook; no objection in forwarding letter of October 4, 1973, to Judge Conti for review, or to counsel for Standard (A-463);
k. November 28, 1973	Transmittal to Judge Conti by Department of Justice of October 4, 1973, letter from Turnbull, *without enclosures* (A-464-470);
l. November 28, 1973	Transmittal to Mussman by Department of Justice of October 4, 1973, letter from Turnbull, *without enclosures* (A-464-470).

3. Production of Documents; Treble Damage Suit:

We set forth below, briefly, the facts relating to the production of documents in the treble damage suit:

a. FIRST REQUEST FOR PRODUCTION OF DOCUMENTS: JUNE 23, 1975:

On June 23, 1975, in response by plaintiff, William R. McCook, to the first request by defendant Standard for production of documents, McCook produced approximately 270 pages of relevant documents.[38] Of these, 63 pages were documents which had not been produced by Turnbull, McCook or Lynn in the prior United States suit, including 36 pages of entirely new documents; 27 pages were versions of documents produced in the prior suit, but with different notations thereon, making them different documents.[39]

Altogether, there were 39 new documents—63 pages—as compared to 62 documents—100 pages—in the set TU-001 - TU-100.

b. DEPOSITION OF WILLIAM R. McCOOK: SEPTEMBER 23-24, 1975: SECOND REQUEST FOR PRODUCTION OF DOCUMENTS:

For the deposition of William R. McCook on September 23-24, 1975, on the subject of production of documents,

38. We exclude documents produced by McCook which consisted of a news bulletin concerning the filing of the complaint against Standard in 1969 in the prior suit, and data concerning Western Samoa and Standard assembled by a research institute for someone else in 1974, after the complaint in the treble damage suit was filed.

39. The differentiating character of the notations was recognized by Lynn:

> "Q. • • • do you recall throwing away at any time a copy or a duplicate of a document *which had handwritten or other notations* on the documents *which were different from the document that you kept in your file:*
>
> "A. No, I think if I ever threw a paper away, you know, *we being attorneys, would be astute enough to examine either duplicate originals or Xeroxes or tissues, and if there are, in fact, markings or notations on one that do not appear on the other,* • • • not to throw *something away that truly is not a copy* (Tr., Lynn Dep., October 14, 1975, pp. 23-24) (emphasis added).

Standard served a second request for production of documents upon McCook, which required him to bring to the deposition the documents produced on June 23, 1975. The second request for production was identical to the first.[40] Except for a few financial statements, no further documents were produced.

McCook testified that he had produced, in the set of documents numbered at the deposition as SDX 92-429, all documents in his possession or control responsive to the second request for production (A-494-495). McCook's attorney[41] stated that he had obtained documents from Turnbull, because Turnbull was an "agent" of the plaintiff, which were included in set SDX 92-429 (A-495). The attorney further stated that Lynn had previously delivered documents to his firm (A-495-496).

At the deposition, the attorney expressed a reservation about some documents that might have gone to the Justice Department, and not returned; he stated:

> "I think the only possible reason for hesitancy [for a representation concerning the completeness of the production of all documents in the possession of partners, associates, agents, attorneys, representatives of

40. The second request, like the first request, called for all documents which related, *inter alia,* to:

> "a. The supply, sale, or distribution of petroleum products in American Samoa;
>
> "b. The financial ability of plaintiff to enter into the business of supplying, selling, or distributing petroleum products in American Samoa;
>
> "c. The storage of petroleum products in American Samoa; and
>
> "d. The manufacture of petroleum products for supply, sale, or distribution in American Samoa."

41. While McCook or Turnbull consulted four different lawyers or law firms prior to trial in the earlier suit concerning a claim against Standard, they did not retain any of these lawyers for the treble damage suit, retaining instead new attorneys contacted after trial.

McCook] might arise from the fact that * * * *maybe some documents went to the Justice Department, and maybe Mr. Turnbull didn't get those back* * * * but if there are documents which exist that relate to the subject matter of this case or deposition, we certainly don't know about them" (A-495) (emphasis added).

c. DEPOSITION OF RICHARD B. LYNN: SEPTEMBER 25, 1975:

On September 25, 1975, defendant Standard took the deposition of Richard B. Lynn, Esq., pursuant to subpoena duces tecum; this deposition followed the second day of the deposition of Mr. McCook.

In response to the subpoena duces tecum, Lynn produced 7 documents which had not been produced for Standard by Turnbull, McCook, or Lynn in the prior suit. These included 6 new documents, not disclosed before to Standard (A-148-149, 150, 151, 159, 225, 226), and a copy of a letter produced by a third party in the prior suit (A-256).

d. DEPOSITION OF RAYMOND C. TURNBULL: NOVEMBER 24, 1975-DECEMBER 2, 1975:

On November 24, 1975-December 2, 1975, Standard took the deposition of Raymond C. Turnbull pursuant to subpoena duces tecum. Turnbull produced 7 relevant new documents not disclosed to Standard in the prior suit (A-118, 119, 120-121, 124, 135-137, 140, 227); in addition, he produced one other document which was a copy of a letter produced by a third party in the prior suit (A-253).

On the last day of the deposition, December 2, 1975, Mr. Turnbull produced 10 file folders maintained in his office in October, 1969, at the time of the visit by Mr. Hollander (A-630-632). Of these file folders, 6 indicated that they contained correspondence relating to petroleum supply in American Samoa: *SDX 1643,* "Pago-Plant Dock Prints Walker-Moody Co." (A-237); *SDX 1644,* "Mobil Petroleum Corporation Correspondence" (A-238); *SDX 1645,* "Unoco

Correspondence and Survey" (A-239); *SDX 1647,* "Petroleum-Confidential/Bank of America-P.C.P.C." (A-241); *SDX 1646,* "Summit Industrial Corporation Correspondence" (A-240); and *SDX 1648,* "Correspondence Gov. Lee Year 1965" (A-242).

By contrast, in October, 1969, the Department of Justice noted receipt of just three files from Mr. Turnbull:

> "1. File of correspondence entitled 'Union Bulk Plant—Samoa';
>
> "2. File of correspondence entitled 'Summit Industrial Corp.—Correspondence'; and
>
> "3. File of correspondence entitled 'Correspondence Gov. Lee 1962-1965' " (A-273).[42]

e. DEPOSITIONS OF RAYMOND C. TURNBULL, JANUARY 28, 1976; WILLIAM R. McCOOK, FEBRUARY 11, 1976:

On January 28, 1976, Standard completed the deposition of Turnbull pursuant to subpoena duces tecum, with respect to production of documents; he testified that he had no further documents (A-638).

On February 11, 1976, Standard completed the deposition of McCook, in connection with the second request for production of documents; he produced no further documents.

f. AFFIDAVIT OF BERNARD M. HOLLANDER: EXHIBITS: FEBRUARY 19, 1976:

On February 19, 1976, in opposition to notices of deposition served by Standard, the trial attorney for the Department of Justice in the prior suit, Mr. Hollander, filed an affidavit with the District Court, Central District, which stated that the only Turnbull documents the trial attorney

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42. At his deposition, Turnbull testified that he took eight or nine files from his cabinet and delivered them to the Justice Department trial attorney in October, 1969, which the attorney took (A-556-557), and that he did not remember receiving the folders back (A-561), but later changed his testimony and said that he did not know if he delivered file folders to the trial attorney, but gave him loose documents (A-634).

could recall receiving prior to termination of the trial in the earlier suit were those designated TU-001 – TU-100 (A-696, 700); attached to the affidavit was correspondence with Turnbull, which included two photographs of a proposed petroleum storage area, and 12 letters or memoranda prepared during the period 1963 through 1965 concerning petroleum facilities or preparation of a site for petroleum facilities in American Samoa, which had been sent by Turnbull to the trial attorney following the affirmance of the judgment below by this Court (A-436-457). None of these documents had been produced in the prior suit; with one exception (A-135-137), the documents had not been theretofore produced in the treble damage suit.

g. DEPOSITION OF SULLIVAN, JONES & ARCHER; LYLE L. JONES; JAMES O. SULLIVAN, MARCH 30-31, 1976:

On March 30-31, 1976, Standard deposed a law firm in San Diego entitled "Sullivan, Jones & Archer" and two of its partners, Jones and Sullivan. The law firm was a successor to Sullivan, Marinos, Augustine & Delafield, which was retained in August, 1970, by Lynn, to investigate a possible treble damage claim by McCook and Turnbull against Standard, in connection with the pending suit by the United States (A-363, 649).

In response to subpoena duces tecum, the law firm produced 24 documents delivered to it by Turnbull and Lynn before trial in the prior suit, which had not been produced for Standard by Turnbull or Lynn in that suit (A-122-123, 124, 125, 141, 152, 153, 154, 155, 158, 160, 161, 162, 170-171, 172-173, 177, 182, 183, 186-188, 200-220, 228, 229-230, 256, 261, 262-263). Included were originals or copies of 15 new documents not theretofore produced in the treble damage suit (A-122-123, 125, 141, 152, 154, 155, 160, 161, 162, 172-173, 177, 182, 183, 186-188, 229-230).

h. SUMMARY: TOTAL NEW DOCUMENTS PRODUCED IN TREBLE DAMAGE SUIT:

In total, 78 new documents—not including duplicates—were produced for Standard in the treble damage suit, including 71 completely new documents, and 7 documents with differentiating notations thereon.

* * * * * * *